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Tuesday, July 14, 1987

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re

DONALD and LEILA HEYMAN,

No. 1-85-01494

Debtors.

_____/

ITT COMMERCE FINANCE CORP.,

[Plaintiff](#) ,

v.

A.P. No. 1-87-0009





DONALD and LEILA HEYMAN,


Defendants.

_____/

Memorandum of Decision

By this [adversary proceeding](#) , plaintiff ITT seeks a nondischargeable judgment against

the debtors for converting the proceeds of its collateral. The facts are fairly simple and, since based solely on the deposition of [debtor](#)  Donald Heyman, undisputed. Debtor Donald Heyman operated a marine supply business where he sold pleasure boats. He had a flooring agreement with plaintiff ITT whereby It would finance the boats in the debtor's inventory. As each boat was sold, ITT was to receive full payment for the amount it had financed. The debtor was regularly "out of trust" with ITT from soon after they began to do business in 1979. That is to say, the debtor would frequently not pay ITT when a boat was sold, instead using the funds to cover general operating expenses. ITT employed a floor checker to verify the existence of boats supposed to be in the debtor's inventory, but the floor checker evidently had a stake in the debtor looking good, and would take the debtor's word without question when the debtor told him that a boat was not in the store because it was "out for a test run" or had been sold but the bank had not yet issued the check. Thus, the floor checker would tell ITT that the boats were still in the debtor's inventory even though they had long ago been sold by the debtor and the proceeds spent. Once the floor checker was in too deep, he gave up actually checking altogether and instead went for lunch or drinks with the debtor, or played golf with one of the debtor's employees. At one time, the debtor became fourteen boats out of trust. He improved his situation somewhat in the months prior to bankruptcy, but when the higher ups at ITT finally realized what had happened and pulled the plug the debtor was still eight boats out of trust, owing ITT \$189,194.73. The court believes that conversion of collateral in cases like this is essentially breach of contract and should not give rise to a [nondischargeable debt](#) , especially when the [creditor](#)  establishes a system where its own employee has strong incentive to mislead it. Nonetheless, the overwhelming majority of reported cases hold such debts to be nondischargeable, and the few cases holding for the debtor, e.g. *In re Gallaudet* (Bkrcty.D.Vt. 1985) 46 B.R. 918, are from circuits which have adopted a strict interpretation of what is meant by "willful and malicious injury" in section 523(a)(6) of the [Bankruptcy Code](#) . In this circuit, the term is interpreted much more liberally in favor of the creditor. *In re Cecchini* (9th Cir. 1986) 780 F.2d 1440. Also, the debtor here did lie repeatedly to the floor checker, which is culpable conduct notwithstanding that the floor checker knew he was not being told the truth.

Reluctantly, the court finds a nondischargeable debt owed to ITT by [defendant](#)  Donald Heyman in the amount of \$189,194.73. The motion for nonsuit of defendant Leila Heyman having been granted at the close of plaintiff's case, counsel for ITT shall prepare and submit an appropriate form of judgment against Donald Heyman only. The debtor's objection to ITT basing its case solely on his deposition is overruled pursuant to FRCP 32(a)(2); a deposition of a party may be introduced by an adverse party as original evidence. *Zimmerman v. Safeway Stores, Inc.* (D.C. Cir.1969) 410 F.2d 1041; 10 Fed.Proc. L.Ed., sec. 26:142. This memorandum shall constitute findings and conclusions pursuant to FRCP 52(a).

Dated: July 14, 1987

ALAN JAROSLOVSKY

U.S. [BANKRUPTCY JUDGE](#) 

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